

OGC 72-1648

9 November 1972

MEMORANDUM FOR: Chief, Foreign Intelligence

SUBJECT : Apparent Deviation of DoD Regulation  
from NSC Directive Implementing  
Executive Order 11652

1. Your memorandum of 27 September, subject as above, to [redacted] raises the question of the apparent deviation from the third-agency rule as expressed in the NSC Directive of May 1972 of the DoD regulation which implements that Directive. A DoD Assistant General Counsel (Mr. Andrews) has sent me the attached memorandum in response to my inquiry to him on the subject.

2. The attachment to Mr. Andrews' memorandum indicates that DoD acknowledges the DoD regulation "could be construed as exceeding the provisions of the NSC Directive." In my view, it could not be construed any other way.

3. I suppose CIA's next move would be to determine whether we regard the DoD regulation as harmful to our interests. My own guess is that any DoD violation of the third-agency rule in connection with assisting in providing protection for the President would not be harmful to CIA activities since we surely would have given to the Secret Service the information involved at the same time we furnished it to DoD. CIA interest in the other two situations cited by DoD is not so clear. If you conclude we should press DoD to revise its regulation, we will be glad to consult or assist as desired. I assume DoD could be persuaded, by one means or another, to correct its regulation, but it may be that in view of the DoD explanation to us we need do nothing further.

[redacted]

Associate General Counsel

Attachment

cc: SA/Information Control

OGC [redacted] sin

Original - Addressee

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DEPARTMENT OF DEFENSE  
OFFICE OF GENERAL COUNSEL  
WASHINGTON, D. C. 20301

November 3, 1972

MEMORANDUM FOR



Associate General Counsel  
Central Intelligence Agency

ST/

Attached are excerpts of a memorandum to me interpreting the Department of Defense rules implementing E.O. 11652 as they relate to the "third agency rule."

I believe the memorandum will provide you assurance that your Agency's information will not be disseminated by Defense without first obtaining its consent.

A handwritten signature in cursive script, reading "Robert T. Andrews".

Robert T. Andrews  
Office, Assistant General Counsel  
(Manpower, Reserve Affairs,  
Health and Environment)

Attachment

This will confirm our telephone conversation of October 19, 1972, concerning a question raised by CIA as to whether the first "excepting" clause in Section 7-202 of 5200.1-R purports to give the Secretary of Defense authority to override the so-called "third agency rule." As you know, the presently expressed third agency rule stems from Section VI. D. of the National Security Council Directive (NSCD), of May 17, 1972, which was the initial implementation of E. O. 11652. The above NSCD provision stemmed from substantially similar language in Section VII of E. O. 10501.

Our 5200.1-R implements the third agency rule in Section 7-202, of 5200.1-R, in the following language:

"Except under rules established by the Secretary of Defense, classified material originating in a non DoD Department or Agency shall not be disseminated outside the DoD without the consent of the originating Department or Agency, except as otherwise provided by Section 102 of the National Security Act, 61 Stat., 495, 50 U.S.C. section 403, which authorizes the Director of Central Intelligence to correlate and disseminate intelligence within the Government." (emphasis added)

It is true that, absent implied consent, the language does recognize that there may be cases when the third agency rule cannot be adhered to, literally. However, it is not used to disseminate "intelligence" or "sources and method" information, which are the areas of primary concern to CIA.

During the consultations which took place when 5200.1-R was being put in final form, a question was raised as to the effect of restating, and thus, reemphasizing, "the third agency rule" in the Regulation. It was pointed out that the DoD has in existence three Directives which, in varying degrees of explicitness, recognize that emergency situations may arise which require DoD to disseminate information to a non-DoD Agency without waiting to secure the consent of the originating Agency. These Directives are:

5030.34 "Agreement Between the United States Secret Service and the Department of Defense Concerning Protection of the President and Other Officials"

3025.12 "Employment of Military Resources in the Event of Civil Disturbances"

5200.27 "Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense"

The Secret Service Agreement is the clearest illustration of the third agency rule being specifically bypassed in emergency conditions, with direct reference to the rule. (See particularly Section III. B.) This was done at the express insistence of representatives of the Secret Service who stated that it was essential to the protection of the President. In that case, we did agree to notify the originating Agency, but after the dissemination. This is a condition that we stand ready to apply in any situation when the rule is bypassed.

With respect to the Civil Disturbances provisions, there is no express provision bypassing the third agency rule, but it has been recognized that the DoD, when activated in those circumstances, would likely have a great deal of information which it had obtained from various sources, but most probably from the FBI, that might be necessary to pass to local authorities on an urgent basis. In such cases, however, it could also be argued that there is an implied consent for us to pass the information because making it available where needed is one of

the purposes causing the non-DoD Agency to give it to DoD. However, DoD would not have express consent.

With regard to DoD Directive 5200.27, that Directive contains the following language with regard to dissemination of information:

"Nothing in this Directive shall be construed to prohibit the prompt reporting to law enforcement agencies of any information indicating the existence of a threat to life or property, or the violation of law, nor to prohibit keeping a record of such a report." (Section VI. A.)

"Access to information obtained under the provisions of this Directive shall be restricted to governmental agencies which require such information in the execution of their duties." (Section VI. C.)

While the third agency rule is not referred to by title, it was recognized as one of the significant reasons for using the language as drafted.

In conclusion, in cases where there is no implied authority to pass the information to a non-DoD Agency, the special exception clause for DoD could be construed as exceeding the provisions of the NSC Directive. However, it is a pragmatic exception that is closely restricted to, or within the clearly implied meaning of, "published rules" of the Secretary of Defense, and even then, only in cases where emergency action is required to meet responsibilities imposed on the Secretary of Defense. In view of these protections, it appears desirable to let our Regulation stand as it is and count on the Secretary of Defense to use the authority only in proper cases. The alternative, namely, restricting DoD authority in emergency cases, such as, situations involving the protection of the President, seems undesirable.